Nos. 19-431 & 19-454

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,
Petitioner,

—v.—

COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

—v.—

COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* YALE LAW SCHOOL PROGRAM FOR THE STUDY OF REPRODUCTIVE JUSTICE IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amicus is the Program for the Study of Reproductive Justice ("PSRJ") at Yale Law School, a national center for academic research and development of new ideas to promote justice with respect to reproductive health issues. Many of the scholars associated with the PSRJ are especially concerned with how restrictions on access to contraception reinforce unconstitutional sex stereotypes in violation of the Fourteenth Amendment.[2]

SUMMARY OF ARGUMENT

First, the Affordable Care Act's ("ACA")[3] contraceptive coverage requirement (the "contraceptive mandate") serves Congress's compelling interest in combatting unconstitutional sex discrimination and satisfies the compelling interest prong of the Religious Freedom Restoration

[1] The parties have granted blanket consent to amicus briefs, proof of which is filed with the Court. No counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than the amicus curiae or its counsel contributed money intended to fund preparing or submitting the brief.

[2] This brief has been filed on behalf of a Center affiliated with Yale Law School but does not purport to present the school's institutional views, if any.

[3] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

Act ("RFRA").[4] as part of a broader effort to combat sex discrimination in health care. Congress ensured access to contraception with no out-of-pocket costs in the ACA as part of a broader effort to combat sex discrimination in health care delivery. Eliminating restrictions on access to contraceptives combats the unconstitutional sex role stereotyping that motivated the first government restrictions on contraceptive access in the United States, and that continues to motivate efforts to restrict access today.

Second, the Final Rule violates the Administrative Procedure Act ("APA")[5] for two reasons. First, the Agencies[6] do not have the statutory authority to issue the Final Rule because Congress rejected exactly the broad exemption scheme proposed here. Second, the Agencies' refusal to give sufficient consideration to Congressional intent and scientific evidence indicating the importance of contraceptive coverage render its decision arbitrary and capricious under the APA.

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[4] 42 U.S.C. § 2000bb (2018).

[5] 5 U.S.C. §§ 701-706 (2018).

[6] "Agencies" refers to the Agencies that issued the Final Rule: the Internal Revenue Service, Department of the Treasury, Department of Labor, and Department of Health and Human Services.

ARGUMENT

I. CONGRESS HAD A COMPELLING INTEREST UNDER RFRA IN REMEDYING HISTORICAL SEX DISCRIMINATION CAUSED BY RESTRICTIONS ON CONTRACEPTIVE ACCESS.

Congress adopted the Women's Health Amendment ("WHA") to the ACA,[7] and the contraceptive mandate that grew out of the WHA, to promote comprehensive access to health care for women as part of a broader effort to promote gender equity.[8] Preliminary data indicate that the fully enforced contraceptive mandate has been successful so far: it has led to decreased out-of-pocket costs for contraceptives as well as increased usage.[9] The new Rule threatens to undermine this progress and directly contravene Congress's explicit intent to promote women's equality through broad access to preventive care, including contraceptives. The sweeping new exemptions[10] in the Rule reinforce outdated and unconstitutional stereotypes of women's roles in social and economic life, which have

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[7] 42 U.S.C. § 300gg-13(a)(4) (2018).

[8] *See infra* § I.C.

[9] Ashley H. Snyder et al., *The Impact of the Affordable Care Act on Contraceptive Use and Costs Among Privately Insured Women*, 28 WOMEN'S HEALTH ISSUES 219, 222 (2018).

[10] The District Court's opinion in *Pennsylvania v. Trump* details the original rules and the changes proposed by the Agencies. 351 F. Supp. 3d 791, 798-805 (E.D. Pa. 2019).

long motivated restrictions on access to reproductive care for women.

A. Restrictions on Contraceptives Have Been Used Historically to Entrench Stereotypes of What Women *Should* Be.

State and federal laws blocking access to contraceptives were adopted to use women's fear of procreation to enforce the view that sex was appropriate only in the context of marriage and only for the purpose of procreation.[11] The justifications for these laws and their selective enforcement, as outlined below, demonstrate that politicians and judges viewed contraceptives as a dangerous means of diverting women from their purported natural destiny to become mothers and their responsibility to control male sexual desire.

For millennia, women used various methods to control reproduction free from formal legal barriers. In the ancient world, long before humans understood the most basic facts about the human reproductive process, people used homemade folk remedies to

[11] *See generally* Linda Gordon, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 7-9, 13-14 (3d ed. 2002); Priscilla J. Smith, *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-first Century*, 47 CONN. L. REV. 971 (2015).

prevent conception, with some success.[12] These remedies included: homemade suppositories to coat the cervix and prevent sperm from passing into the uterus, various spermicidal agents made with acidic liquids like citrus juices or vinegar, rudimentary diaphragms or other devices placed over the cervical opening, various medicines or "potions," douching or other attempts to "wash" sperm out of the vagina after intercourse, rudimentary condoms using animal skins or plants, withdrawal prior to ejaculation, and the "rhythm" method.[13] While these methods improved over millennia, the effectiveness of contraceptives did not significantly improve until the development of rubber condoms and diaphragms in the nineteenth century,[14] the introduction of hormonal contraceptives in the twentieth century,[15] and most recently the invention of both hormonal and non-hormonal long-acting reversible contraceptives ("LARCs").[16] Despite the

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[12] *See* Gordon, *supra* note 11, at 13 ("Birth control was not invented by scientists or doctors. It is part of folk culture, and women's folklore in particular, in nearly all societies.").

[13] *See id.* at 14, 16, 18–21 (outlining and describing all of the aforementioned pre-modern contraception practices).

[14] *See id.* at 14, 32.

[15] *See also* Lara Marks, SEXUAL CHEMISTRY: A HISTORY OF THE CONTRACEPTIVE PILL 3–4 (2001); Brief for Appellants at 12, *Poe v. Ullman*, 367 U.S. 497 (1961) (No. 60) (citing Alan Guttmacher et al., *Contraception Among Two Thousand Private Obstetric Patients*, 140 J. AM. MED. ASSOC. 1265, 1267 (1949)).

[16] The effectiveness of modern contraceptives has taken a huge leap forward in the last fifty years, with some methods now

condemnation of contraceptives by many, though not all, religious authorities,[17] in post-Revolutionary America birth control techniques were widespread. Their use appears to have increased significantly from the late eighteenth century—when women on average gave birth to eight children—through the start of the twentieth century, when the average married woman gave birth to three children.[18]

While social disapproval drove contraceptive use underground, a legal framework restricting contraceptives was not established in the United States until the Victorian Era, with its particularly regressive views of women's roles. For example, it was during this time that the Supreme Court upheld a prohibition on women joining the bar, reasoning that "[t]he constitution of the family organization, which is founded in the divine ordinance, as well as

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approaching 100% effectiveness, even with typical use. *See* Div. of Reprod. Health & Nat'l Ctr. For Chronic Disease Prevention and Health Promotion, *U.S. Medical Eligibility Criteria for Contraceptive Use, 2010*, 59 MORBIDITY & MORTALITY WEEKLY REPORT, 1, 5 (June 18, 2010), https://bit.ly/39MviSY (reporting rates of effectiveness with typical use of certain contraceptives, including 99.2% and 99.8% for the two forms of intra-uterine devices, 99.95% for the implant, 92% for the combined oral contraceptive pills and 92% for the pill (99.78% if use is perfect)).

[17] *See* Gordon, *supra* note 11, at 7, 9, 14 (discussing the condemnation of birth control by Judaism, Christianity, and Islam on the theory that interference with the procreative function of sex was immoral) .

[18] *See id.* at 22–23.

in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood." *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872). Just one year later, Congress adopted the Comstock Act,[19] a federal law banning, among other things, the manufacture, sale, advertisement, distribution through the mail, and importation of contraceptives. Because the Comstock Act only pertained to materials sent through mail, the vast majority of states soon enacted their own laws banning contraception.[20]

Although attitudes towards the immorality of contraception began to change in the twentieth century,[21] and the Comstock law itself lost its teeth

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[19] The Comstock Act, ch. 258, 17 Stat. 598-99 (1873)) (naming the law "An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use."), was named after the well-known "moral crusader" Anthony Comstock.

[20] Carol Flora Brooks, *The Early History of the Anti-Contraceptive Laws in Massachusetts and Connecticut*, 18 AM. Q. 3, 4 (1966) (noting that forty-six states had anti-contraceptive laws and obscenity statutes). *See also* C. Thomas Dienes, LAW, POLITICS AND BIRTH CONTROL 42-47 (1972) (discussing state laws restricting contraception).

[21] *See* Note, *Judicial Regulation of Birth Control Under Obscenity Laws*, 50 YALE L.J. 682, 685-86 & n.35 (1941) (describing poll results which indicated public opposition to birth control laws had decreased). In addition, studies confirmed a rise in sexual activity. *See* Gordon, *supra* note 11, at 130–31 (describing a study of college-educated women which found that women born between 1890–1899 had "twice as high a percentage of premarital intercourse as those born before

in 1936,[22] state laws banning contraception enacted during the Comstock era remained in place well into the twentieth century. While these laws applied on their face to both men and women, and were upheld to protect "public morality," courts often explicitly relied on now-outdated stereotypes of men and women's proper sex roles, and specifically the notion that women's proper role was to have sex within marriage, and produce and raise children. Indeed, some courts cited women's fear of childbirth outside of marriage as a useful mechanism for deterring "illicit" sex. *See, e.g.*, *People v. Byrne*, 163 N.Y.S. 682, 686 (N.Y. Sup. Ct. 1917).

For example, in New York, a court described contraceptive information pamphlets titled "What Every Girl Should Know" as containing information "which not only should not be known by every girl, but which perhaps should not be known by any." *Id.* at 684. The court upheld New York's law as protecting "public morals" noting that information suggesting that individuals engaging in sexual

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1890," and the trend continued. Of those born before 1890, 13.5% experienced intercourse before marriage; of those born between 1890–99, the percentage increased to 26%; of those born between 1900–1909, 48.8% had premarital intercourse; and of those born after 1909, 68.3% had intercourse prior to marriage).

[22] *United States v. One Package*, 86 F.2d 737, 739 (2d Cir. 1936) (holding Act no longer applied to the use of contraception "employed by conscientious and competent physicians for the purpose of saving life or promoting the well being of their patients.").

intercourse "without the fear of resulting pregnancy . . . would unquestionably result in an increase of immorality." *Id.* at 685-86. Massachusetts similarly upheld a law prohibiting the advertising of contraceptives on moral grounds, noting that the law's "plain [and legitimate] purpose" was to "protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the state and nation a virile and virtuous race of men and women." *Commonwealth v. Allison*, 116 N.E. 265, 266 (Mass. 1917). In upholding these laws, courts endorsed sex stereotypes, promoted by state legislatures, that viewed the sexuality of women—those who would be subject to pregnancy without contraception—as legitimate only in the context of marriage and for the purpose of procreation.

States' selective relaxation of these laws in the decades that followed provides further evidence that they were based on sex role stereotypes. In many jurisdictions, condoms—the only form of contraception controlled by men—were exempted from the ban on contraception, ostensibly to prevent the spread of sexually transmitted diseases. In Massachusetts, for example, the Supreme Judicial Court held that condoms were not covered by the contraception ban because "it does not appear to be any part of the public policy of the Commonwealth, as declared by the Legislature, to permit venereal disease to spread unchecked even among those who indulge in illicit sexual intercourse." *Commonwealth v. Corbett*, 29 N.E.2d 151, 152 (Mass. 1940). The

Court recognized that two years earlier it had "refused to read into the statutory prohibition in question any exception permitting the prescription in good faith by physicians, in accordance with generally accepted medical practice." *Id.* In other words, the Court was willing to allow contraceptives for the purposes of preventing venereal disease—which affects men, as well as women—but not to protect women from the risk of life- and/or health-endangering pregnancy.

In Connecticut, too, contraceptives became available for prevention of disease instead of conception. *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring). Nevertheless, a Connecticut court refused to recognize an exception from the ban for women with a medical need for contraception, advising women instead to abstain from sex altogether. *Tileston v. Ullman*, 26 A.2d 582, 586 (Conn. 1942). It left to the legislature the question of whether "the frailties of human nature and the uncertainties of human passions render it impracticable . . . that the husband and wife would and should refrain when they both knew that intercourse would very likely result in a pregnancy which might bring about the death of the wife." *Id.* In these ways, courts revealed the sex stereotypes underlying the efforts to block access to contraceptives.

The rationales for state laws and their selective enforcement had a common theme: blocking women's access to contraceptives was viewed as a

legitimate way to preserve the traditional conception of American women as chaste and pure and as only engaging in sexual activity for the purpose of reproduction within marriage. Legislatures, run exclusively by men, viewed women as purer than men, in need of paternalistic protection from contraceptive devices that could tempt them into deviating from their preordained path toward motherhood.[23]

B. Greater Access to Contraception Promotes Gender Equity and Combats Unconstitutional Sex Stereotypes.

As state legislative restrictions on contraceptive access loosened, women with the ability to afford contraceptives were able to choose paths other than motherhood and increased their economic earning power. Allowing women to control when and whether they have children has empowered generations of women to advance professionally and obtain greater economic power on par with their male colleagues. Methodologically rigorous studies have found that access to contraceptives is related to increased enrollment in professional programs, which in turn allows women to access professions such as law and medicine in

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[23] *See* Gordon, *supra* note 12 at 9 ("C]onservatives . . . typically acceded to the notion that women were purer than men and that the only worthy purpose of sexual activity was reproduction.").

unprecedented numbers. *See generally* Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730 (2002). Recent studies have linked access to contraceptives to higher graduation rates, increased labor participation, and increased wages for women. Adam Sonfield, et al., *The Social and Economic Benefits of Women's Ability To Determine Whether and When to Have Children*, 7-14 GUTTMACHER INSTITUTE (Mar. 2013), https://bit.ly/2JLGLHX.

Unfortunately, not all women have been able to access contraceptives and the attendant professional and economic benefits equally. Long-acting reversible contraceptives, the most effective and reliable form of contraception, cost well over $1,000 for uninsured women. David Eisenberg, Colleeen McNicholas, & Jeffrey Peipert, *Cost as a Barrier to Long-Acting Reversible Contraceptive (LARC) Use in Adolescents*, 52 J. ADOLESCENT HEALTH 59, 60 (2013). Even for insured women, out-of-pocket costs such as deductibles and co-pays directly impact whether women choose LARCs. Aileen M. Gariepy et al., *The Impact of Out-of-Pocket Expense on IUD Utilization Among Women with Private Insurance*, 84 CONTRACEPTION 39 (2011). Because of these high out-of-pocket costs, low-income women and, disproportionately, women of color have lacked equal access to contraception and the gender equity facilitated by women's ability to time and plan their pregnancies. *Hearing Before the Institute of Medicine Committee on Preventive Services for*

Women (2011) (written testimony of Dr. Hal C. Lawrence, Vice President of Practical Activities of the American College of Obstetrics and Gynecologists), https://bit.ly/3c2ggda.

C. Congress Adopted the Women's Health Amendment to Promote Gender Equity in Health Care, and thus Women's Equality in Economic and Social Life.

In enacting the Affordable Care Act, Congress explicitly sought to promote gender equity by ensuring access to contraception for all women regardless of income. The original bill included a provision prohibiting the practice by insurers of charging women higher premiums than men. Additionally, Congress adopted the Women's Health Amendment to build on the ACA's overall objective to promote women's equality. Senator Barbara Mikulski, the sponsor of the WHA, stated that "what the overall bill does is end gender discrimination" in health care. She viewed her amendment as a guarantee that "preventive and screening services are comprehensive and available to women." Senate Democrats, *Women's Preventive Care Addressed in First Democratic Health Amendment*, YOUTUBE (Dec. 1, 2009), https://bit.ly/3c2lXb7. Senator Kirsten Gillibrand echoed Senator Mikulski's concerns, noting that:

> In America today, too many women are delaying or skipping preventive care

> because of the costs of copays and limited access. In fact, more than half of women delay or avoid preventive care because of its cost. This fundamental inequity in the current system is dangerous and discriminatory and we must act. The prevention section of the bill before us must be amended so coverage of preventive services takes into account the unique health care needs of women throughout their lifespan.

155 Cong. Rec. S12027 (daily ed. Dec. 1, 2009). Senators Gillibrand, Boxer, and Franken explicitly mentioned family planning as a critical component of comprehensive preventive care that women require, *see* 155 Cong. Rec. S12025, S12027, and S12052 (daily ed. Dec. 1, 2009), and Senator Feinstein framed the stakes of the WHA in terms of the historical fight for gender equity, comparing discriminatory lack of health care access to historical bars on the right to vote, inherit property and receive a higher education. 155 Cong. Rec. S12114 (daily ed. Dec. 2, 2009).

D. Enactment of the Women's Health Amendment and its Requirement that Contraceptives are Available Without Cost Serves Congress's Compelling Interest in Preventing Discrimination on the Basis of Sex.

For almost fifty years, this Court has recognized that state policies that entrench stereotypes of what women *should* be unconstitutionally discriminate on the basis of sex.[24] *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 519, 533 (1996) (the state "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"). And in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court specifically recognized the relationship between regulation of reproduction and sex inequality, explaining that laws restricting reproductive control that are grounded in and further entrench unfounded stereotypes about women are unconstitutional:

> The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.

505 U.S. at 856. The Court recognized that Pennsylvania's spousal notification requirement "embodie[d] a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the

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[24] *See generally* Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From* Struck *to* Carhart, 70 OHIO ST. L.J. 1095 (2009).

nature of the rights secured by the Constitution." *Id.* at 898.

Applying these principles, in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003), Chief Justice Rehnquist recognized that parental leave policies denying equal access to leave violated the Equal Protection Clause. The Chief Justice recognized that "mutually reinforcing stereotypes create[] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver." *Id.* at 736.

As this Court held, preventing gender discrimination qualifies as a compelling state interest. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).[25] Because limited access to contraceptives undermines gender equity and has historically been based on enforcing gender stereotypes, Congress has a compelling interest in ensuring access to contraception without cost-sharing in order to combat sex discrimination. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 263 (D.C. Cir. 2014), *vacated by Zubik v. Burwell*, 136 S. Ct. 1557 (2016)) ("the government has overlapping

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[25] *See also, e.g.*, *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (holding that the State was justified in enacting protections for persons, regardless of sex, to full and equal privileges in all business establishments because it had a compelling interest in preventing discrimination against women).

and mutually reinforcing compelling interests in promoting public health and gender equality."). *See also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (assuming without deciding that the governmental interest in "guaranteeing cost-free access" to contraception was "compelling."). As then-Judge Kavanaugh wrote:

> Justice Kennedy strongly suggested in his Hobby Lobby concurring opinion—which appears to be controlling de facto if not also de jure on this particular issue—that the Government generally has a compelling interest in facilitating access to contraception for women employees.

Priests for Life v. U.S. Dep't of Health & Human Servs., 808 F.3d 1, 22 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of *reh'g en banc*) (citing *Hobby Lobby*, 573 U.S. at 735-36 (Kennedy, J., concurring)); *see also Hobby Lobby* at 725-27 (majority opinion); *id.* at 760-763 (Ginsburg, J., dissenting)). Specifically, then-Judge Kavanaugh recognized that the Government had a compelling interest in facilitating access to contraception to, *inter alia,* advance women's equality interests:

> It is not difficult to comprehend why a majority of the Justices in *Hobby Lobby* (Justice Kennedy plus the four dissenters) would suggest that the Government has a compelling interest

> in facilitating women's access to contraception. . . . It is commonly accepted that reducing the number of unintended pregnancies would further women's health, *advance women's personal and professional opportunities*, reduce the number of abortions, and *help break a cycle of poverty that persists when women who cannot afford or obtain contraception become pregnant unintentionally at a young age*.

808 F.3d at 22-23 (emphasis added). Consequently, for this reason and others, the contraceptive mandate satisfies the compelling interest prong of RFRA's test. 42 U.S.C. § 2000bb–1(b) (allowing incidental burdens on religion where federal government action is "in furtherance of a compelling governmental interest" and narrowly tailored to "the least restrictive means of furthering that compelling governmental interest").

Moreover, the limited exemptions available before the Rule at issue here ensured that the mandate was tailored as narrowly as possible without undermining Congress' compelling interest, which requires comprehensive coverage. Consequently, the contraceptive mandate satisfies RFRA. 42 U.S.C. § 2000bb–1(b).

II. THE AGENCIES LACK STATUTORY AUTHORITY TO ISSUE THE FINAL RULE.

The APA requires a reviewing court to "hold unlawful and set aside agency action" found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). It is "improper . . . to give a reading to [an] Act that Congress considered and rejected." *Pacific Gas & Elec. Co. v. Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 220 (1983); *see also Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984) (noting that where Congress has already directly spoken to the issue, no deference is due to a conflicting Agency interpretation). But that is exactly what happened here.

In 2012, Congress considered and rejected the Blunt Amendment, a proposal to create the very same broad religious and moral exemption to the WHA embodied in the Final Rule. *See* 158 Cong. Rec. S538-539 (daily ed. Feb. 9, 2012) (granting exemption from mandate for those for whom mandate is contrary to "religious beliefs" or "moral convictions").[26] Numerous Senators called for the Senate to reject the Amendment to uphold equal access to comprehensive healthcare for women. Senator Frank Lautenberg specifically tied the proposed Amendment to previous damaging

[26] *See* 158 Cong. Rec. S1173 (daily ed. Mar. 1, 2012) (rejecting Blunt Amendment).

stereotypes about women's lack of autonomy in society, explaining that the amendment would:

> [A]llow a woman's employer to deny coverage for any medical service that they, the employer, have a moral problem with. Imagine that. Your boss is going to decide whether you are acting morally. The Republicans want to take us forward to the Dark Ages again when women were property that they could easily control and even trade if they wanted to. It is appalling that we are having this debate in the 21st century.

158 Cong. Rec. S1162 (daily ed. Mar. 1, 2012). Senator Patrick Leahy argued that the Blunt Amendment would undermine Congress's intent to combat sex discrimination in health care when it enacted the ACA:

> At the core of the Affordable Care Act was the principle that all Americans, regardless of health history or gender, have the right to access health care services. This amendment turns that belief around . . . This serves only to put businesses and insurance companies in the driver's seat, allowing them to capriciously deny women coverage of health care services.

158 Cong. Rec. S1171 (daily ed. Mar. 1, 2012). And Senator Bernie Sanders opined: "Members of Congress—mostly men, I should add—are trying to roll back the clock on women's reproductive rights." 158 Cong. Rec. S1169 (daily ed. Mar. 1, 2012).

Congress's rejection of the Blunt Amendment is "the end of the matter," and courts must enforce "the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. To do otherwise, to allow an agency with delegated authority to violate the unambiguous will of Congress, would violate separation of powers principles. *See Util. Air. Reg. Grp. v. EPA*, 573 U.S. 302, 327 (2014) (allowing an agency to act inconsistently with an "unambiguous statue" violates separation of powers).

III. THE RULE IS ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT.

An agency rulemaking is arbitrary and capricious when the agency:

> [R]elied on factors which Congres has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983); *see also* 5 U.S.C. § 706(2)(A) (2018)). In this case, the Agencies violated these fundamental rules.

A. The Agencies' Explanations For Their Decision to Adopt the Rule Run Counter to the Evidence in the Record, Are Implausible, and Cause the Agency to Ignore Important Aspects of the Problem.

Where empirical evidence is in the Record or can be readily obtained, it is a crucial factor for judicial review. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009). The Rule is arbitrary and capricious because the Agencies' explanations for their decision directly contradict the evidence in the Record and are implausible. *See State Farm*, 463 U.S. at 43 (holding that a Rule is arbitrary and capricious where the Agency "fail[s] to consider an important aspect of the problem" or "offer[s] an explanation for its decision that runs counter to the evidence"); *Md. Dep't of Health & Mental Hygiene v. Ctrs. for Medicare & Medicaid Servs.*, 542 F.3d 424, 428 (4th Cir. 2008) (citation omitted). The Agencies' failure to grapple with the data in the record contradicting their justifications for the Rule, or to give a satisfactory explanation for ignoring it, render the Rule arbitrary and capricious. *See State Farm*, 463 U.S. at 43; *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) (Sentelle, J.) ("Nodding to concerns raised by commenters only to dismiss

them in a conclusory manner is not a hallmark of reasoned decisionmaking."). Moreover, because the Agencies dismiss the evidence in the Record that establishes the need for the contraceptive mandate and the harm the Rule will impose, the Agencies make the additional error of failing to consider an important aspect of the problem the mandate was designed to address. *State Farm*, 463 U.S. at 43 (a Rule is arbitrary and capricious where the Agency "fail[s] to consider an important aspect of the problem"). The Agencies' justifications for the Rule fail for four reasons.

First, as discussed more extensively *supra* at § I.C, Congress recognized that contraceptive coverage is necessary to remedy sex discrimination and promote gender equity. It also recognized that significant scientific evidence establishes, without doubt, the existence of considerable barriers to contraceptive access, particularly for low-income women, and that reducing these access-barriers would improve women's ability to participate as equal citizens in public and private lives. As then-Judge Kavanaugh recognized:

> It is commonly accepted that reducing the number of unintended pregnancies would further women's health, *advance women's personal and professional opportunities*, . . . and *help break a cycle of poverty that persists when women who cannot afford or obtain*

> *contraception become pregnant unintentionally at a young age.*

Priests for Life v. U.S. Dep't of Health & Human Servs., 808 F.3d, 1, 22-23 (Kavanaugh, J., dissenting from denial of reh'g en banc) (emphasis added). The Agencies wholly failed to address this vital motivation behind the contraceptive mandate rendering the Rule arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

Second, the evidence before the Agencies established without doubt that access to contraceptives reduces the rates of unintended pregnancies and, as a result, the numbers of abortions. But the Agencies appear to deny the causal link between increased access to contraceptives provided by the contraceptive mandate and the reduction of unintended pregnancy. *See, e.g.*, Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,804 (Oct. 6, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147) ("Programs that increase access to contraception are found to decrease teen pregnancies in the short run but increase teen pregnancies in the long run."). This claim is simply wrong. The evidence in the Record definitively establishes that increased contraceptive access reduces unintended pregnancies in the general population and specifically does not increase teen pregnancies in the short or the long term.

The Congressional Record similarly indicates that Congress understood that contraceptive access reduces unintended pregnancies. *See* 155 Cong. Rec. 176, 12052 (Oct. 1, 2009) ("Access to contraception is fundamental, a fundamental right of every adult American, and when we fulfill this right, we are able to accomplish a goal we all share—all of us on both sides of the aisle to reduce the number of unintended pregnancies."). The Agencies' rejection of express Congressional intent emphasizes the arbitrariness and capriciousness of the Agencies' action because its "reasons and policy choices" deviate "from or ignore the ascertainable legislative intent." *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520 (D.C. Cir. 1983); *accord Chem. Mfrs. Ass'n v. EPA*, 217 F.3d 861, 865-67 (D.C. Cir. 2000).

Once again, then-Judge Kavanaugh's insights are useful:

> It is not difficult to comprehend why a majority of the Justices in *Hobby Lobby* (Justice Kennedy plus the four dissenters) would suggest that the Government has a compelling interest in facilitating women's access to contraception. . . . It is commonly accepted that reducing the number of unintended pregnancies would further women's health, [and, *inter alia*], reduce the number of abortions.

Priests for Life, 808 F.3d at 22 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of *reh'g en banc*). The Agencies' decision-making on this issue "runs counter to the evidence" before it and "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

Third, the Agencies fail to adequately grapple with the evidence that health *benefits* to women of oral contraceptives greatly outweigh any health risks. In fact, the Agencies fail to mention that the very sources they cited to support their claim that oral contraceptives cause health harms include findings that contraceptives cause a decreased risk of endometrial, ovarian, and colorectal cancers, findings which are consistent with numerous other studies. *See, e.g.*, *Oral Contraceptives and Cancer Risk*, National Cancer Institute (Mar. 21, 2012), https://bit.ly/2UQEGkf; LJ Havrilesky et al., *Oral Contraceptive Use for the Primary Prevention of Ovarian Cancer*, Agency for Healthcare Research and Quality, Report No. 13-E002-EF (June 2013).

Moreover, the weight the Agencies place on the claimed health risks of contraceptives compared to their health benefits is inconsistent with the factual record. For example, the Agencies cited a study finding a link between oral contraceptives and breast cancer. Religious Exemptions and Accommodations, 82 Fed. Reg. at 47,804. Despite overwhelming evidence in the Record establishing that these studies were flawed and contradicted all

other studies on the issue, the Agencies affirmed their reliance on the study in the Final Rule. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592, 57,610 (Jan. 14, 2019) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147). The Rule is therefore arbitrary and capricious because "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions" which the Agencies did not do here. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). The Agencies failed to conduct an even-handed analysis and thus violated the standards of the APA.

Fourth, the Agencies' explanation for its decision that the exemption will be inconsequential to nearly all women of childbearing age is also inconsistent with the facts before it. In fact, the very studies relied on by the Agencies in promulgating this rule demonstrate significant gaps in coverage filled by the contraceptive mandate. The Rule—allowing anyone with any objection to the mandate to opt out—will cause these gaps to reemerge, defeating the very purpose of the law. The Agencies' claim that the Rule will have only a limited impact on women's access is inconsistent with common sense, as well as the factual record before the Agencies.[27]

[27] *See, e.g.*, Refusing to Provide Health Services, The Guttmacher Institute, https://bit.ly/3c7zRZL (last updated Apr.

This finding also deviates from factual assessments made by Congress. Senator Gillibrand testified that women lack preventative and contraceptive care "because of the costs of copays and limited access. In fact, more than half of women delay or avoid preventive care because of its cost," 155 Cong. Rec. S11987 (Nov. 30, 2009), and Senator Mikulski stated that "[w]omen are often faced with the punitive practices of insurance companies." *Women's Preventive Care Addressed in First Democratic Health Amendment*, YouTube (Dec. 1, 2009), https://bit.ly/34lJK30. Once again, the Agencies ignored Congress's intent rendering the Agencies' actions arbitrary and capricious. *See, e.g.*, *Small Refiner Lead*, 705 F.2d at 520.

B. The Agencies Acted Arbitrarily and Capriciously in Failing to Justify Their Deviation from the Original Rule.

Finally, the Agencies' actions are also arbitrary and capricious because the Agencies have not offered sufficient justification for their deviation from their original interpretation of the Women's Health Amendment. Congress did not itself enumerate the "preventative care" mandated by the

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1, 2020); Alison Cuellar, Adelle Simmons & Kenneth Finegold, *The Affordable Care Act: Promoting Better Health for Women*, Off. of the Assistant Secretary for Planning and Evaluation, Dep't of Health & Hum. Servs. (June 14, 2016).

Women's Health Amendment. Instead, in 2011, HRSA commissioned the Institute of Medicine to provide recommendations, which it then adopted. These recommendations interpret "preventative care" to include all FDA-approved contraceptive methods. *See* HRSA, Women's Preventive Services Guidelines, https://bit.ly/34mX33y. In 2013, the Agencies issued a Rule providing accommodations to those with religious objections to contraception. *See generally Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013). This Rule presented four criteria organizations had to meet in order to qualify for the accommodation. And the accommodation ensured that women would nonetheless receive seamless coverage for contraception.

The 2017 Rule significantly expanded eligibility for accommodations and exemptions by introducing protections for moral convictions; offering accommodations to for-profit entities, whether closely held or publicly traded; removing the self-certification requirement; and eliminating the notice requirement. The new Rule allowed any covered entity to select an exemption, which would prevent seamless coverage for women, unlike the accommodation available under the old Rule.

When changing a rule, an agency must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television*, 556

U.S. 502, 516. In the Interim Final Rule, the Agencies merely concluded:

> Our review is sufficient to lead us to conclude that significantly more uncertainty and ambiguity exists in the record than the Departments previously acknowledged when we declined to extend the exemption to certain objecting organizations and individuals as set forth herein, and that no compelling interest exists to counsel against us extending the exemption.

82 Fed. Reg. 47,805. But agencies must justify their decisions with evidence beyond a "conclusory statement." *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993). In fact, the majority of the studies cited in the Interim Final Rule were available when the more narrowly-tailored accommodations were originally put forth in 2011. The Agencies' assessment that there is "significantly more uncertainty"—relying on studies that were available at the time the previous rule was adopted— is a conclusory and therefore an insufficient explanation for this drastic policy change. For this reason also, the Rule is arbitrary and capricious. *See, e.g.*, *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995); *Wis. Valley Improvement v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001).

CONCLUSION

Therefore, amici respectfully request that the Court affirm the opinion below and vacate the Rule.

Respectfully submitted,

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